

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

BABYAGE.COM, INC.,	:	
Plaintiff-Counterclaim Defendant	:	
	:	
v.	:	CIVIL ACTION NO.
	:	3:07-cv-01600-ARC
LEACHCO, INC.,	:	
Defendant-Counterclaim Plaintiff/	:	
Third Party Plaintiff	:	Judge A. Richard Caputo
	:	
and	:	
	:	Filed Electronically
JAMIE S. LEACH,	:	
Counterclaim Plaintiff/	:	
Third Party Plaintiff	:	
	:	
v.	:	
	:	
JOHN M. KIEFER, JR.,	:	
Third Party Defendant	:	

**PLAINTIFF-COUNTERCLAIM DEFENDANT’S AND
THIRD PARTY DEFENDANT’S THIRD AMENDED ANSWER
TO COUNTERCLAIMS**

Plaintiff-Counterclaim Defendant, BabyAge.com, Inc. (“BabyAge”), and Third Party Defendant, John M. Kiefer, Jr. (“Kiefer”), by and through their attorney, Andrew J. Katsock, III, Esquire, hereby answer the Counterclaims of Defendant-Counterclaim Plaintiff/Third Party Plaintiff, Leachco, Inc. (“Leachco”), and Counterclaim Plaintiff/Third Party Plaintiff, Jamie S. Leach (“Leach”), as follows:

COUNT 1

1. BabyAge and Kiefer are without knowledge or information sufficient to form a belief as to the truth of the averment.

2. BabyAge and Kiefer are without knowledge or information sufficient to form a belief as to the truth of the averment.

3. Admitted as to its residence and established place of business; denied as to the remainder.

4. Denied.

5. BabyAge and Kiefer admit that this action purports to be an action for patent infringement, but deny that Leachco or Leach is entitled to any recovery. While BabyAge and Kiefer do not contest subject matter jurisdiction, the allegations of this paragraph are legal conclusions for which no answer is required or given.

6. BabyAge and Kiefer admit the face of the patent bears an issue date of July 13, 2004, but deny its validity.

7. BabyAge and Kiefer are without knowledge or information sufficient to form a belief as to the truth of the averment.

8. BabyAge and Kiefer are without knowledge or information sufficient to form a belief as to the truth of the averment.

9. Denied.

10. Denied.

11. Denied.

12. Denied.

13. BabyAge and Kiefer are without knowledge or information sufficient to form a belief as to the truth of the averment.

14. Denied.

15. Denied.

COUNT 2

16. BabyAge and Kiefer are without knowledge or information sufficient to form a belief as to the truth of the averment.

17. Admitted.

18. BabyAge and Kiefer admit that this action purports to be an action for trademark infringement, but deny that Leachco or Leach is entitled to any recovery. While BabyAge and Kiefer do not contest subject matter jurisdiction, the allegations of this paragraph are legal conclusions for which no answer is required or given.

19. BabyAge and Kiefer are without knowledge or information sufficient to form a belief as to the truth of the averment.

20. Admitted.

21. Admitted.

22. Admitted as to the display and description of Leachco products. Denied as to the remainder.

23. Denied.

24. Denied.

25. Denied.

26. Denied.

COUNT 3

27. BabyAge and Kiefer are without knowledge or information sufficient to form a belief as to the truth of the averment.

28. BabyAge and Kiefer are without knowledge or information sufficient to form a belief as to the truth of the averment.

29. Admitted.

30. BabyAge and Kiefer admit that this action purports to be an action for patent infringement, but deny that Leachco or Leach is entitled to any recovery. While BabyAge and Kiefer do not contest subject matter jurisdiction, the allegations of this paragraph are legal conclusions for which no answer is required or given.

31. The allegations contained in Paragraph 31 of Leachco's Counterclaim are conclusions of fact and of law to which no response is required under the Federal Rules of Civil Procedure and they are, therefore, deemed denied and placed in issue. Strict proof thereof is demanded at the time of trial.

32. Denied.

DEFENSES

33. Proprietary Cozy Comfort pillow products manufactured, used, and offered for sale by BabyAge do not infringe U.S. Patent No. 6,760,934.

34. BabyAge sought legal counsel prior to selling its Cozy Comfort pillow and did not willfully infringe.

35. Upon information and belief, Leachco and Leach knew or should have known that the design and use of BabyAge's Cozy Comfort pillow does not infringe any of the claims of U.S. Patent No. 6,760,934, and nevertheless brought the Counterclaim against BabyAge and Kiefer for the purpose of wrongfully excluding BabyAge from the market for pillows; by initiating and maintaining the Counterclaim, Leachco and Leach have engaged in patent misuse and vexatious litigation barring Leachco and Leach from any relief herein.

36. Consumer confusion does not exist.

37. No confusion or misrepresentation exists, in part, because purchase is made after careful consideration by educated and attentive consumers.

38. Leachco and Leach have cited no evidence of mistake or actual confusion.

39. Any putative confusion is merely theoretical.

40. Leachco and Leach have not established any trademark rights.

41. BabyAge's usage of Leachco products, descriptions and corporate name has been fair usage.

WHEREFORE, BabyAge and Kiefer respectfully seek judgment against Leachco and Leach and ask the Court to:

(A) Declare that BabyAge has not engaged in either patent or trademark infringement, confused or misled the public, or otherwise engaged in unfair competition;

(B) Find U.S. Patent No. 6,760,934 invalid;

(C) Declare that BabyAge has the right to sell its Cozy Comfort pillow free from interference by Leach and Leachco, its officers, agents, servants, employees, attorneys, privies, representatives, successors and assigns, and any and all persons acting by, through, or under authority from Leachco, either separately or jointly;

(D) Permanently enjoin Leach and Leachco, its officers, agents, servants, employees, attorneys, privies, representatives, successors and assigns, and any and all persons in active concert or participation with or under authority from Leachco, either separately or jointly, from:

1) Interfering with, or threatening to interfere with the manufacture, sale or use of the Cozy Comfort pillow by BabyAge, its related companies, successors, assigns or customers;

- 2) Instituting or prosecuting any suit or other proceeding placing in issue the right of BabyAge or its related companies, successors, assigns or customers to make, sell or use the Cozy Comfort pillow;
- 3) Instituting or prosecuting any suit or other proceeding placing in issue the right of BabyAge or its related companies, successors, assigns or customers to fair usage of Leachco's product descriptions and corporate name;

(E) Deny all relief requested by Leachco and Leach in Counts 1, 2 and 3 of their Counterclaims;

(F) Order Leachco and Leach to pay BabyAge's costs, including reasonable attorney's fees; and

(G) Grant such other relief as the Court deems appropriate under all the circumstances.

Date: November 10, 2008

/s/ Andrew J. Katsock, III, Esquire
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